

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF OHIO

3 WESTERN DIVISION

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5 NORCAL TEA PARTY PATRIOTS, : CIVIL NO. 1:13-CV-341  
6 et al., :  
7 Plaintiffs, : Preliminary Pretrial  
8 -vs- : Conference by Telephone  
9 :  
10 INTERNAL REVENUE SERVICE, : Friday, September 5, 2014  
11 et al., : 9:38 a.m.  
12 Defendants. : Cincinnati, Ohio

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14 TRANSCRIPT OF PROCEEDINGS  
15 BEFORE THE HONORABLE SUSAN J. DLOTT, CHIEF JUDGE  
16 - - -

17 For the Plaintiffs: Edward D. Greim, Esq.  
18 Todd P. Graves, Esq.  
19 Dane Martin, Esq.  
20 Graves Garrett, LLC  
21 1100 Main Street, Suite 2700  
22 Kansas City, Missouri 64105  
23  
24 David R. Langdon, Esq.  
25 Langdon Law, LLC  
8913 Cincinnati-Dayton Road  
West Chester, Ohio 45069  
Christopher R. Finney, Esq.  
Finney Law Firm, LLC  
4270 Ivy Pointe Boulevard, Suite 225  
Cincinnati, Ohio 45245  
Bill Randles, Esq.  
Bill & Bev Randles Law Group, LLP  
5823 N. Cypress Avenue  
Kansas City, Missouri 64119

26 For the Defendants Internal Revenue Service and Department of  
27 the Treasury:

28 Grover Hartt, III, Esq.  
29 U.S. Department of Justice  
30 Tax Division  
31 717 North Harwood, Suite 400  
32 Dallas, Texas 75201

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Joseph A. Sergi, Esq.  
Laura C. Beckerman, Esq.  
Laura M. Conner, Esq.  
U.S. Department of Justice  
Tax Division  
555 Fourth Street, NW  
Washington, D.C. 20001

Matthew Joseph Horwitz, Esq.  
Assistant United States Attorney  
221 East Fourth Street, Suite 400  
Cincinnati, Ohio 45202

Courtroom Deputy: William Miller

Court Reporter: Julie A. Wolfer, RDR, CRR

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PROCEEDINGS

(9:38 a.m.)

COURTROOM DEPUTY: All right. Counsel, we're here for a conference call today in Case Number 1:13CV341, NorCal Tea Party versus the Internal Revenue Service.

And on the phone representing the plaintiffs, I believe I have David Langdon, Bill Randles, Chris Finney, Edward Greim, Dane Martin, and Todd Graves.

Is there anybody else on the phone that I missed representing the plaintiffs?

All right. Thank you.

And on the phone representing the defendants, I believe I have Grover Hartt, Joseph Sergi, Laura Beckerman, Laura Conner, and Matthew Horwitz.

Is there anybody else on the call that I have missed?

Okay. Thank you.

Here in chambers, we have Chief Judge Dlott. Julie Wolfer is the court reporter.

And if you could please identify yourselves before you speak. Thank you.

THE COURT: Good morning, counsel.

Mr. Horwitz, we have to stop meeting like this.

MR. HORWITZ: You're going to get tired of seeing me, Your Honor.

THE COURT: I just spent two-and-a-half hours with

1 Mr. Horwitz yesterday morning on the final pretrial for a  
2 four-month qui tam trial.

3 All right. So we have another fun case today. And I  
4 think we need to set a schedule. Have counsel conferred on  
5 this at all?

6 MR. GREIM: Your Honor, this is Eddie Greim for the  
7 plaintiffs, and we have conferred. We've submitted a  
8 relatively thick amended joint discovery plan, but we are not  
9 in agreement on some points.

10 THE COURT: All right. I've got your plan here. Why  
11 don't we go through what -- where the disagreements are.

12 MR. GREIM: Sure. And, Your Honor, I think the  
13 quickest way is just to march through just to -- just to march  
14 through number by number.

15 THE COURT: Okay. That's fine.

16 MR. GREIM: So, number one, we didn't agree to  
17 magistrate.

18 THE COURT: Are you sure? Would you like to  
19 reconsider that?

20 MR. GREIM: I didn't say that. I didn't want to open  
21 the door.

22 THE COURT: All right.

23 MR. GREIM: Number two, we have already exchanged  
24 initial disclosures, so that is done.

25 Number three is where it kind of gets interesting.

1           The main issue here, Your Honor, is, you know, I don't  
2 think we -- we somewhat dispute possibly the scope that -- the  
3 what of discovery, but the main issue right now is whether  
4 there should be bifurcated discovery. And in this case, the  
5 bifurcation would relate to, you know, class certification  
6 discovery versus merits discovery. And so that's kind of  
7 that -- frankly, that's the main issue on number three.

8           The parties have basically agreed on things like  
9 whenever the expert report is due, how much time somebody else  
10 has and things like that. But the issue of class certification  
11 is the big issue. And so the plaintiffs, you know, we want to  
12 do -- we want to move for certification as soon as we can. The  
13 problem is that, you know, there's some tricky issues that  
14 we'll have to resolve. There's going to be, just based on how  
15 things have gone over the last year, we expect it may be hard  
16 getting some discovery and so, you know, and also the  
17 government has said that it's got to redact things and there  
18 are issues with producing documents.

19           So the government would like to have us file -- or to  
20 have bifurcated discovery and class discovery close by December  
21 12th of this year which is just three months or so from today.  
22 What we would like to do is not have bifurcation. We think  
23 that the distinction between class and merits discovery in this  
24 case, given the claims that are still here, that that  
25 distinction just doesn't make sense. We would instead have the

1 Court fix a deadline for us to file our motion by and sort of  
2 put the burden on the plaintiffs, frankly, of being smart about  
3 the discovery that they seek and, you know, sort of make us  
4 pick the things that we know we can get and that we know will  
5 support that motion rather than, you know, sort of creating  
6 this secondary issue so that every time we ask for something,  
7 there is a debate about whether it is properly class or  
8 properly merits discovery.

9 So I know the government will want to have its own  
10 comments on that, but that's the big issue is when is the  
11 deadline. So we proposed a back-end deadline of August of 2015  
12 by which we have to file our motion. Our plan and our hope is  
13 not to wait that long, but we also don't want to set an early  
14 date, get tied up with discovery fights, and then have to come  
15 back to you and present motion practice on this to the Court.  
16 So that's our proposal.

17 THE COURT: Okay.

18 MR. GREIM: Based on that, Your Honor, we would then  
19 just build an overall discovery cut-off. Discovery will change  
20 a little bit depending on whether the class is certified or not  
21 but -- we think inasmuch as the government says, but that  
22 basically is part three.

23 Point four, limitations on discovery. We have a  
24 little change from our very initial discovery report from a  
25 year ago that the -- we had asked for extra -- we had asked for

1     instead of 10 depositions, 40 depositions, and we had asked for  
2     35 interrogatories instead of 25. The government was in  
3     agreement before, but now the government wants to limit us to  
4     the rules; and the basis for that, the government says, is that  
5     much, you know, that the Bivens part of Count Two is gone and  
6     the associational standing is not there for the Privacy Act, so  
7     therefore, we're back down to the regular numbers. And we can  
8     talk more about that, but that's the basic issue.

9             THE COURT: And tell me, say that again. You wanted  
10    40 depos and how many interrogatories?

11            MR. GREIM: 35 instead of 25.

12            THE COURT: Okay.

13            MR. GREIM: And then finally, I think we agree that  
14    there will be a protective order submitted to the Court. I  
15    mean, we -- I'm sure we agree. We haven't negotiated one yet,  
16    but in a case like this, it seems to make -- it seems necessary  
17    to have that because there will be some issues we'll talk about  
18    in a little bit about Section 6103, which is actually the basis  
19    of one of our claims, but it's also something to be aware of in  
20    discovery. And so a protective order doesn't just make 6103 go  
21    away, but it does a lot in a case like this to make sure that  
22    we don't have unwilling participants or folks who maybe don't  
23    realize they're part of a class suddenly having stories about  
24    them appearing somewhere because information was exchanged in  
25    this case and, you know, was accessible on the docket or

1 something like that. So we think a protective order makes a  
2 lot of sense, and we just need to submit one to the Court. And  
3 maybe one result of our call would be a deadline for doing  
4 that.

5 THE COURT: Okay.

6 MR. GREIM: And, Your Honor, that's basically it.  
7 That is kind of a high-level review and I tried not to argue  
8 anything too much, but that's where we are.

9 THE COURT: Okay. That was a great summary,  
10 Mr. Greim. Thank you very much.

11 Who wants to speak on behalf of the United States?

12 MR. HARTT: Your Honor, this is Grover Hartt. I have  
13 been kind of carrying the ball in this case, but as the Court  
14 may recall from our last conference, because I have a trial  
15 coming up in two weeks now, my colleague Mr. Sergi has been  
16 taking the laboring oar in working out things of discovery, and  
17 so I would defer to him in just a second.

18 I will say again I think there will be an enormous  
19 dispute on the scope of discovery that permeates a lot of what  
20 we have to talk about today. And as the Court can see and may  
21 recall from our oral argument back on June the 30th, from our  
22 perspective, discovery is what this case has always been about,  
23 and the desire of the plaintiffs to go what we think is far  
24 beyond what's appropriate for this case, particularly now in  
25 its reduced state, is an issue that I'm afraid the Court's only



1 going to have to resolve because I think we're at loggerheads.  
2 And with that, I'll turn it over to Mr. Sergi.

3 THE COURT: All right. Mr. Sergi.

4 MR. SERGI: Good morning, Your Honor. This is Joe  
5 Sergi.

6 THE COURT: Good morning.

7 MR. SERGI: The only disagreement I have with  
8 Mr. Hartt is that there actually were straws involved, and I  
9 received the short one.

10 So obviously the government, as we say in our papers,  
11 disagree with the class the way discovery should go. We  
12 believe class discovery should be bifurcated from fact  
13 discovery, and the reason for that is because this is a very  
14 different kind of animal because it's a tax case. And I  
15 actually rooted around our division here and I checked, you  
16 know, my records, and I'm actually unaware of other tax class  
17 actions. And the big problem with a tax class action is  
18 Section 6103 of the Internal Revenue Code which prevents the  
19 Service and subjects them to criminal liability for disclosing  
20 tax return information of third parties.

21 Now, there are exceptions to 6103, like, for example,  
22 (h)(2) allows the Service to give things to the Department of  
23 Justice and (h)(4) allows us to give stuff to the Court if it's  
24 pertinent to the case under various exceptions. There are also  
25 exceptions, for example, final determinations, once it can be

1 released, if taxpayer information is stripped out under Section  
2 6110, and then full applications completely unredacted can be  
3 released under Section 6104. So I believe Mr. Greim mentioned  
4 that in his part. In our part, we point out that given that  
5 Count Two is limited only to pending actions, neither 6110 nor  
6 6104 exceptions would apply.

7 So our concern, and we've already received discovery  
8 from opposing counsel on this, is that without a determination  
9 of a class or in our mind a determination that there can't be a  
10 class, but I know I'm putting the cart before the horse, it's  
11 very -- it would be next to impossible for us to properly  
12 answer discovery because of the limitation of 6104; and due to  
13 the nature of that, the discovery ends up being incredibly  
14 complicated and overbroad.

15 As you can see, what we put in there is the chart that  
16 they sent us with all these things, and that's, I think, their  
17 attempt to get around 6103 when in fact, if we were to go  
18 through class discovery for three months, motions for  
19 certification a short time after that, then that could  
20 alleviate the entire problem with class certification and the  
21 6103 issues.

22 We also think, and I'm also way ahead, that if a class  
23 is eventually certified, it can be an open-ended class. We  
24 think people would have to actually opt into the class because  
25 they would need to obtain 6103 waivers.

1           Mr. Greim alluded to the fact that a protective order  
2 provides some protection for 6103. We will be willing to enter  
3 a protective order, but we were going to do that for his  
4 benefit because that really -- a protective order provides  
5 absolutely no protection under 6103 because you can't find your  
6 way around it. Just like, for example, we have this issue in a  
7 lot of our cases, the clawback under 501 also doesn't apply to  
8 6103. So we're often in positions in large document cases  
9 where Courts are not happy with us because we won't agree to a  
10 clawback for our documents because we just can't because it's  
11 on me if I miss a document under 6103. Then I'm subject to the  
12 sanctions of the criminal liability. So the Service has it and  
13 then I have an added duty to make sure that nothing goes out.

14           Related to that is another discovery request issue  
15 from opposing counsel where they've asked for all documents  
16 produced to Congress redacted. So right now at last check  
17 there is over 800,000 pages of those documents, which would  
18 mean that I would have to review every one of them to make sure  
19 those redactions are correct. So if we had narrowed the class,  
20 then perhaps, you know, as we were made a determination, if  
21 there is the determination that there is no class, then we're  
22 limited to the ten plaintiffs for the 6103 count, inspection  
23 and disclosure count, and we're limited to one plaintiff for  
24 Count Two which would greatly limit the case.

25           Where we ended up on this is we believe that there's

1 enough -- we hope, we don't believe. We hope there is enough  
2 information in what we filed because this is actually the  
3 longest 26(f) report I've ever filed. But if the Court needs  
4 more information, what we found in researching the issue of  
5 bifurcation is it's usually done by motion, and we would be  
6 happy to brief it.

7 THE COURT: Okay.

8 MR. SERGI: Thank you, Your Honor.

9 THE COURT: Which I think will be necessary. Thank  
10 you for suggesting that.

11 Mr. Greim?

12 MR. GREIM: Your Honor, we -- you know, I'm afraid  
13 we're getting lost in the tangle of 6103 here because, you  
14 know, first of all, this issue of bifurcation, that somehow  
15 pre-bifurcation or pre-class certification we're going to have  
16 this massive amount of documents and then after the class  
17 certification, you know, whether it's yes or no. If it's no,  
18 we're going to only have a few people waiting around here and  
19 who are still waiting or who are subject to 6103 information  
20 disclosure that we'll be able to do, like, a word search for  
21 their names in the documents and then just produce a few  
22 hundred documents where they're mentioned and then that's  
23 discovery.

24 The problem, Your Honor, is that discovery in this  
25 case is going to have to be about the sort of process that the

1 IRS used here. It's going to have to be about, you know, how  
2 they hatched the plan, who carried it out, and who looked at  
3 documents as a result of that. And so there is a big chunk of  
4 documents like the documents that the IRS is producing to  
5 Congress that have been redacted already for 6103, like the  
6 documents that they're producing in the Judicial Watch case  
7 which have been redacted for 6103, that aren't specific to any  
8 one plaintiff. And so what we're concerned about is that  
9 discovery turns into this procedural quagmire where we go  
10 motion by motion by motion over a period of years and only  
11 slowly get the documents, you know, out of the government. And  
12 that's what I'm afraid we're headed to.

13 Now, let me move beyond this question of bifurcation  
14 because I think there's something wrong here also with 6103 and  
15 the way this has been presented. First of all, groups that  
16 consent to disclosure, Your Honor, the Service can disclose  
17 documents with their return information to us. And so there  
18 will be groups who do that, number one.

19 THE COURT: Okay.

20 MR. GREIM: Number two, there ought to be a way for us  
21 to have a Court-ordered contact with the class and obtain that  
22 or obtain some sort of an opt-out for people who don't want to  
23 see the documents. I mean, that's one other idea. That's  
24 another way to avoid this very slow, staggered discovery.

25 A third point, Your Honor, is that, you know, there's

1 a lot of documents that are not subject to 6103. Mr. Sergi  
2 mentioned two of the statutes that are essentially carve-outs,  
3 6104, 6110.

4 And finally, there's the question of redaction. We  
5 think that can be done. But we believe actually that the  
6 redactions should be done in such a way that we can then go  
7 back and say, okay, this clump of documents was about some  
8 discernible, you know, call them person Y that, you know, group  
9 Y, that looks like they fall into the class.

10 And so let me kind of try to paint a picture, Your  
11 Honor, of how this would all fit together. I found it very  
12 interesting to hear the government point to this chart in our  
13 discovery like it's some sort of confusing logic puzzle or  
14 something that can't be figured out. They say, well, that's  
15 just the kind of merits discovery we want to avoid. But I  
16 think, Your Honor, just by making that argument, what they're  
17 doing is they're showing how they're going to continue to raise  
18 this fight about class or merits all the way through and  
19 prolong things.

20 And here's what I mean by that: That chart simply  
21 takes four logical categories of plaintiffs, ones who you know  
22 were granted, ones who were denied, people that gave up and  
23 went through, and people who are still waiting. Everyone fits  
24 into one of those four categories. And then for each category,  
25 we're just asking for a number that meets one of the criteria

1 that's pled in our pleadings. And so we've got about five  
2 criteria, and then at the bottom we have some cross-references  
3 so we can see how many different boxes each person fit into.

4 Now, that is exactly the kind of discovery you do, as  
5 you might know, Your Honor, when you are trying to figure out  
6 the outlines of a class. Yet the government seized upon the  
7 fact that there is a chart with numbers in it and says, oh,  
8 it's merits discovery. What I'm worried about is if we  
9 bifurcate, Your Honor, we're going to do this over and over and  
10 over again and, unfortunately, we're going to have to keep  
11 having calls and keep coming back to you, and pretty soon we're  
12 going to be way past whatever initial upfront deadline has been  
13 set.

14 And I don't -- look, I don't mean to -- and I don't  
15 want to do this, I don't want to accuse the government of  
16 anything, but that is, you know, having defended class actions,  
17 that is sort of one of the things you do is you put in  
18 deadlines and then you make it so that it's easy to run into  
19 those and that discovery comes out very slowly, and I really  
20 think the 6103 issue is being used to do that. There's  
21 workarounds. There's things we can do here, and, you know, I  
22 think we can have briefing on that. I think that might be  
23 helpful, Your Honor. But I think the bifurcation issue is just  
24 something we shouldn't get tangled up with because then it's  
25 going to be another month or two months or whatever before we

1 really get going with discovery.

2 THE COURT: Okay. Mr. Sergi, anything else?

3 MR. SERGI: Your Honor, the only thing I will say is  
4 actually a lot of what Mr. Greim said I thought actually  
5 supported our position why we need bifurcated discovery is  
6 we're going to have lots and lots of fights over 6103. And he  
7 pointed out the fact that there is the ability to obtain  
8 waivers. Well, if you have a class of an unidentified amount  
9 of people and you don't know who they are, then it's impossible  
10 for you to get the waivers. We can't tell him who is in the  
11 class.

12 And he suggested, you know, the Court ordering, I  
13 forgot, a closed order or having, you know, group A or taxpayer  
14 B. There's actually Supreme Court law on that that says you  
15 actually can't do that. Also, you can't redact out -- if a  
16 document is in a taxpayer's file, it doesn't -- it can't come  
17 out of that file. The classic example we do when we train our  
18 new attorneys here is we tell them an agent is reading The Wall  
19 Street Journal and they see their audit person in The Wall  
20 Street Journal and they put The Wall Street Journal in the  
21 file, well, that entire page of The Wall Street Journal is  
22 subject to 6103 protection for that taxpayer even though it's a  
23 public document. But if the Department of Justice were to find  
24 that article without looking at the file, then we could produce  
25 it.



1           So the quagmire is 6103. And that's what we're trying  
2     to avoid because it is such a restrictive and complicated  
3     provision, and it's probably why there are few, if none, tax  
4     class action lawsuits.

5           In addition, the Judicial Watch case is a FOIA case,  
6     Your Honor. They're seeking documents that were produced to  
7     Congress. Now, they've gotten a waiver for the production fee,  
8     but normally when you make a FOIA request of that breadth,  
9     you're paying a per page rate for all the documents. And I  
10    think if anyone sees anything in the media, we can all agree  
11    that the hearings going on on the Hill are way beyond the  
12    report or any of the issues in this case. I mean, the last I  
13    heard, they were talking about Lois Lerner's personal e-mail  
14    which would have absolutely no part in this case. So that's  
15    our concern, Your Honor.

16           So with that, I'll yield.

17           MR. GREIM: Your Honor, this is Mr. Greim. If I could  
18    respond just to one thing.

19           THE COURT: Sure. Go ahead.

20           MR. GREIM: We just very strongly disagree with I  
21    guess Mr. Sergi's view of the law on this about the Supreme  
22    Court case and -- okay, I said one thing.

23           The second thing, I guess, is, you know, we believe  
24    things like Miss Lerner's personal e-mail, there's no reason  
25    why that is not a part of this case. I mean, that is directly

1 relevant to 6103. And so I guess sometimes we're just a little  
2 confused about the government's view of the case and what this  
3 really is. But, you know, if the personal e-mail is being used  
4 to forward things around, and I thought there was one  
5 indication of that, that's very relevant and that's why we've  
6 been discussing, the parties at least, her BlackBerry and  
7 what's been done to preserve those materials.

8 I mean, look, there are just some issues here and  
9 they're not going to go away by bifurcating the case or by just  
10 running the 6103 and just trying to avoid big chunks of  
11 discovery.

12 THE COURT: Okay. Mr. Sergi, anything else?

13 MR. SERGI: I was not referring to Miss Lerner's  
14 e-mails being used for official purposes. I was referring to  
15 the e-mails sent to her husband and the fact that they had  
16 asked for every e-mail that she had ever sent during the time  
17 period from her personal account.

18 I will also just once again say we are not hiding  
19 behind 6103 here. 6103 is driving this entire case, as it does  
20 every one of our cases. This isn't us for the first time.

21 I almost found it amusing because in the initial  
22 Judicial Watch case, there was a reporter that said a very  
23 rarely used section called 6103 is used to prevent handing over  
24 these documents, and everyone in our office laughed at that  
25 because 61 -- we wake up in the morning, and 6103 is the first

1 thing we think about when we come to work, and it is the last  
2 thing we think about when we leave to make sure we didn't leave  
3 anything out. It is foremost on our minds. It is an  
4 incredible complication.

5 We believe by either identifying the specific people  
6 who are the plaintiffs here or if there is a class, that  
7 specific people who would be people that would be in that class  
8 is the easiest way around that, and the only way to do that is  
9 through certification.

10 MR. HARTT: And, Your Honor, this is Grover Hartt.  
11 I'll just point out Count Three, which is the big count that's  
12 left standing after the Court's ruling, is they're suing us  
13 under 6103. I mean, that's it. Sorry.

14 THE COURT: Okay. That's fine.

15 All right. I'm going to take this under submission.  
16 I'm going to have to think through this now that I've heard  
17 your arguments. And we will set up another call with the  
18 parties very soon. If there's anything further, I think I need  
19 to make a decision. I'll let you know or I'll give you my  
20 decision.

21 In fact, Bill, let's come up with a date now --

22 COURTROOM DEPUTY: Okay.

23 THE COURT: -- so that we don't let this go too far.  
24 And we got everyone on the phone right now, so we can make sure  
25 it works with their schedules.

1           MR. GREIM: Your Honor, while we're doing that -- this  
2 is Mr. Greim -- I just wanted to raise one other issue not  
3 really on discovery but it might be relevant to the way the  
4 case goes.

5           THE COURT: Okay.

6           MR. GREIM: I can do it now or I can just -- or I can  
7 wait.

8           THE COURT: No, you go ahead. That's fine.

9           MR. GREIM: There was some discussion in our last call  
10 about the government filing sort of a defensive notice of  
11 appeal in another case and may be doing so here. And I know by  
12 my calculation, they're using the 60-day period, I think that's  
13 next week. However, we noticed that in this other Z Street  
14 case, they have tried to voluntarily dismiss their notice of  
15 appeal as potentially being prematurely filed. And I  
16 wondered -- I have not heard from the defendants. I wonder if  
17 they would be able to say whether they are going to try to file  
18 a notice of appeal in this case.

19           THE COURT: That's a good question.

20           MR. SERGI: Yes, Your Honor. I actually had that. I  
21 have two issues to discuss at the end, and that was one of  
22 them.

23           The other case is Z Street, as Your Honor knows, and  
24 that's one of the cases that this Court relied on --

25           THE COURT: Right.

1 MR. SERGI: -- in -- "relied" is strongly used -- is  
2 cited in its decision.

3 THE COURT: No, I think you can say I relied on it.  
4 That's fair.

5 MR. SERGI: I use relied upon. What happened was the  
6 way our process works here is we can't appeal unless the  
7 Solicitor General authorizes it. And so when we were all  
8 together the last time, the Solicitor General had not made its  
9 determination on Z Street as to whether it would authorize  
10 either a permissive appeal or an appeal as of right. And --

11 THE COURT: And the deadline is next week?

12 MR. SERGI: Right.

13 In our case, what -- we were in a holding pattern  
14 because if it was an appeal as of right, then we would have had  
15 an appeal as of right as well. And we, for consistency  
16 purposes, we would have taken -- we would have had to take our  
17 appeal.

18 What happened was the Solicitor General did not  
19 authorize an appeal as of right but it did authorize them to  
20 file a motion for interlocutory appeal which they cannot --  
21 which cannot be -- go forward until it's dismissed the actual  
22 appeal of right that was filed. So they're waiting for that  
23 dismissal before they move for interlocutory appeal.

24 I don't know if the Court's going to grant that  
25 interlocutory appeal. But on our side, we have now asked the

1 Service -- it's the same thing here for us. We have to get the  
2 views of the Service. We have to write a memo. The Solicitor  
3 General has to approve it. We have asked for and received  
4 informal views from the Service. We're waiting for their  
5 formal views. But it's going towards an interlocutory appeal,  
6 and I believe the rule for interlocutory appeal is just timely,  
7 right, yeah, reasonable time.

8 And really, the deciding factor for us, Your Honor, is  
9 whether or not Z Street goes up because then we would have the  
10 issue of, well, one is up and one's going forward, and so we  
11 really haven't made that determination yet. So basically my  
12 answer is we're looking at it. We have not made a  
13 determination either way.

14 THE COURT: Okay. Anything else from you on that  
15 issue, Mr. Greim?

16 MR. GREIM: Well, Your Honor, I guess I just say we,  
17 you know, we don't think that an interlocutory appeal can stand  
18 here and we hope it does not delay this case moving forward,  
19 but I'll say nothing more until we hear more.

20 THE COURT: Okay. All right.

21 Mr. Sergi, you said you had one other point you wanted  
22 to bring up.

23 MR. SERGI: Yes, Your Honor.

24 Your Honor, Mr. Greim alluded to it in the beginning,  
25 and that is it could fall into this conference as maybe a need

1 to amend the complaint, and that is it was the government's  
2 understanding and from all the arguments and from the complaint  
3 and from the papers filed in this case that essentially the  
4 6103 claim they filed, the disclosure claim, was -- and I'm  
5 going to oversimplify it just for my purposes and I'm not meant  
6 to cast it in a negative light or anything, I'm just going to  
7 simplify it -- and that is the plaintiff was asked for  
8 information that they did not believe was appropriate. They  
9 produced that information to the government who then looked at  
10 it and then which was a wrongful inspection and then forwarded  
11 it to their supervisors which was then a wrongful disclosure.  
12 And then so what we did was we argued in essence that that  
13 under the law is not wrongful inspection or wrongful  
14 disclosure. We filed our motion for summary judgment. The  
15 Court ruled and said it's a summary judgment issue the  
16 government -- they're able to prove, hey, they didn't have to  
17 produce this stuff, and we said -- or we did produce this  
18 stuff, and we say, no, we had a right to look at it.

19 Now, in our conversations with Mr. Greim and  
20 plaintiffs is we've discovered that they're -- I'm going to  
21 call it a new position because it's a new position for us, is  
22 any document whatsoever that was filed with the Service could  
23 be subject to this inspection or wrongful disclosure, and the  
24 example that we use when we were discussing this is Mr. Greim  
25 mentioned, well, say they filed their form, which obviously

1     there's nothing wrong with the form. They initiated that. The  
2     Service didn't ask for that. And then that form is forwarded  
3     to someone who shouldn't have seen it. Well, our position on  
4     that, Your Honor, is there are no allegations whatsoever that  
5     that occurred, and all they are doing is fishing for the hopes  
6     that that occurred.

7             So, for example, taking it out of this case, it would  
8     be me filing a 1040 and then suing the Service for wrongful  
9     disclosure to say that I think somebody looked at it that  
10    shouldn't have. Give me everybody that looked at it. And then  
11    that's also what we attached, another interrogatory from them,  
12    to identify anyone at the Service who looked at anything  
13    related to any of the applications of any possible person in  
14    the class. And we think that that's overbroad. And we thought  
15    it would be helpful to discuss what they're pointing to for  
16    their support for that is the sentence in your opinion, and  
17    they quote it, that says, well, it's -- you know, we have the  
18    right to prove that whoever received the disclosure has the  
19    right to see it. And I thought it would be helpful for us to  
20    discuss it in front of you since we do, even though we haven't  
21    decided the class action issue, we actually have discovery  
22    that's due in one -- I believe it's due two weeks -- a week  
23    from Monday, and that's one of the things we have to worry  
24    about. And so rather than merely object and then bring it on  
25    motions, I thought it might be good to discuss that up front.



1 THE COURT: Okay. Mr. Greim.

2 MR. GREIM: Your Honor, unfortunately, I think we  
3 disagree with pretty much the -- from the beginning to the end  
4 of what Mr. Sergi said. And I understand -- at some level I  
5 understand where the government is coming from because of the  
6 view they formed of this based on really their own argument on  
7 the motion to dismiss.

8 The complaint controls here. The amended complaint  
9 controls, and, you know, the amended complaint is clear. We  
10 say this is paragraph 246 and 247 is the key here. And we say  
11 defendants inspected plaintiffs' information and shared it  
12 amongst themselves even though they knew it was unnecessary for  
13 making a decision on plaintiffs' tax-exempt status.

14 And so, Your Honor, there's really two different  
15 things that can go wrong here. One is that unnecessary  
16 information is requested and then inspected, and that's what  
17 all of our argument -- that's what the motion to dismiss  
18 revolved around. The reason that happened is that that was the  
19 basis of the government's motion to dismiss. So everybody was  
20 arguing about that.

21 But the second part here is they can ask for stuff  
22 that in the ordinary course is legitimate, that other (c)(4)  
23 clients, people have sent in, and then, you know, three or four  
24 months later they get their letter and off they go but it was  
25 forwarded around and scrutinized and aggregated and used at the

1 IRS not for tax administration purposes, and that is detailed  
2 elsewhere in our complaint.

3 Now, the motion to dismiss, Your Honor, focused on the  
4 first issue because the government's argument, if you remember,  
5 is that they tried to recast our claim as an improper request  
6 claim. So to respond to that, we had to say, well, wait a  
7 second, it's not an improper request claim. The issue is what  
8 then happens to that information down the road. And so I fully  
9 understand this. I mean, I think the government then began to,  
10 starting with its own argument and our response, hone in on  
11 that, and so we had this dispute going through in our Rule 26  
12 conference.

13 But, look, we've struck -- we've been arguing about  
14 this for, you know, over a year now. We've had motions to  
15 dismiss. The Court has spoken in the pleading here. It's time  
16 to move on with discovery. And we object to anything about  
17 going back and amending the complaint again, adding in another  
18 layer of motions or objections based on the government, you  
19 know, not kind of seeing the second part of the 6103 theory.

20 THE COURT: Okay. Anything else on that issue,  
21 Mr. Sergi?

22 MR. SERGI: Only that I will tell Your Honor if that  
23 was indeed the double meaning behind that paragraph because  
24 we've used the word that was not necessary to be in context  
25 with the remaining paragraphs that said information requested

1 that was not necessary, then there are no facts pled  
2 specifically in the complaint to support that allegation and  
3 which is why we didn't address it in our motion because we  
4 assumed we did a plain reading, and we would ask the right to  
5 file a motion to dismiss for that specific claim because right  
6 now where we are is in a fishing expedition, Your Honor, and  
7 that's not what these cases are for. This case is big enough  
8 without that.

9 MR. GREIM: Your Honor, this is Mr. Greim. And there  
10 are plenty of facts pled about that, about Carter Hull reading  
11 it, about Judith Kindell viewing the information, about it  
12 having to be approved by Mr. Wilkins' office at chief counsel's  
13 office. There are plenty of facts about that. And we strongly  
14 object to another round of motion to dismiss briefing.

15 We just -- we understand the government focused on the  
16 first part of it and they chose that argument for whatever  
17 reason on their motion to dismiss. We think it's wholly  
18 inappropriate to go back and now find different issues with it  
19 and bring another motion to dismiss. We think it is time for  
20 discovery.

21 THE COURT: I would agree with that. I'm certainly  
22 not going to go through another round of motions to dismiss.

23 All right. Is there anything else that counsel want  
24 to bring to the Court's attention right now?

25 All right. Let's schedule, then, another conference.

1 COURTROOM DEPUTY: How far out?

2 THE COURT: Let's see, a couple weeks maybe because  
3 I'm going out of town next week.

4 COURTROOM DEPUTY: End of September maybe, last week?

5 THE COURT: I think it could be -- let's see. Today  
6 is the 5th. The week of the 22nd?

7 COURTROOM DEPUTY: Okay.

8 THE COURT: Except I'm out one day there. I'm out on  
9 Thursday.

10 COURTROOM DEPUTY: What about how about the afternoon  
11 of September 23rd around 3:30?

12 MR. GREIM: Your Honor, that works for the plaintiffs.

13 THE COURT: Okay.

14 MR. SERGI: Your Honor, that works for me and the  
15 government.

16 THE COURT: Great.

17 MR. HARTT: To be clear, Your Honor, this is Grover  
18 Hartt. My trial begins on the 22nd and so I will not be able  
19 to attend the hearing, but Mr. Sergi can certainly carry the  
20 ball for us.

21 THE COURT: Oh, I appreciate the fact you're in trial.  
22 Where are you in trial?

23 MR. HARTT: I'm in Dallas. I can sleep in my own bed.

24 THE COURT: Oh, good. How long is it supposed to  
25 last?

1 MR. HARTT: We're hoping two weeks, you know.

2 THE COURT: Oh, boy. After the one Mr. Horwitz and I  
3 sat through yesterday, that's nothing.

4 MR. HARTT: The Court we have here wanted two weeks of  
5 it.

6 THE COURT: Okay. I will get back with you all on the  
7 23rd. Thank you very much for all the preparation you did for  
8 this. I appreciate it.

9 Anything else?

10 MR. GREIM: Thank you, Your Honor.

11 MR. SERGI: Thank you, Your Honor.

12 MR. HARTT: Thank you, Your Honor.

13 (Proceedings concluded at 10:18 a.m.)

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15

16 C E R T I F I C A T E

17 I, Julie A. Wolfer, the undersigned, do hereby  
18 certify that the foregoing is a correct transcript from the  
19 record of the proceedings in the above-entitled matter.

20 s/Julie A. Wolfer  
21 Julie A. Wolfer, RDR, CRR  
22 Official Reporter  
23  
24  
25